Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

ESTATE OF MARY LOWE, BY ROBERT F. HARRIS,
COOK COUNTY PUBLIC GUARDIAN AND
SUPERVISED ADMINISTRATOR,
Petitioner,

v.

APEX TAX INVESTMENTS, INC. AND JOHN HERNDON,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2006, this Court vacated the judgment of the Supreme Court of Illinois in this cause and remanded the case to that court for further consideration in light of this Court's decision in *Jones v. Flowers*, 547 U.S. 220 (2006). On remand, the Illinois court reaffirmed its prior decision, effectively holding that this Court's decision in *Jones* should be limited to its facts, or, at least, to the precise type of statutory scheme involved in *Jones*, so that notice and hearing were not constitutionally required prior to the complete and final extinguishment of the homeowner's property interest in this case. The Illinois court's failure to give this Court's decision in *Jones* its natural and proper effect raises the following questions, which now warrant review by this Court:

1. Whether the Due Process Clause requires that a homeowner be provided with notice of the judicial proceeding at which the title to her home, and all of her property interest in it, will be extinguished once and for all?

2. Whether the party responsible for providing a homeowner with constitutionally sufficient notice is free to ignore an undelivered, returned notice, which either reveals the homeowner's actual whereabouts or contains information that is reasonably likely to lead to the discovery of her whereabouts, simply because the party took some reasonable steps to provide the homeowner with actual notice before the new information came to its attention?

3. Whether a finding of "due diligence," made as a matter of state law in an *ex parte* proceeding, may constitutionally foreclose a homeowner who did not receive actual notice of the proceeding from challenging, on federal constitutional grounds, the sufficiency of the efforts made to discover her whereabouts?

PARTIES TO THE PROCEEDING

Petitioner is the Estate of Mary Lowe, by Robert F. Harris, Cook County Public Guardian and Supervised Administrator of the Estate of Mary Lowe. Respondents are Apex Tax Investments, Inc. and John Herndon.

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PETITION FOR A WRIT OF CERTIORARI

The Estate of Mary Lowe by Robert F. Harris, Cook County Public Guardian and Supervised Administrator, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Illinois in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois (Pet. App. 1a-29a) on remand from this Court, which is the subject of this petition, is reported as *In re Application of County Collector*, 867 N.E.2d 941 (Ill. 2007). This Court's order (Pet. App. 30a) granting petitioner's first petition for a writ of certiorari, vacating the prior judgment of the Supreme Court of Illinois, and remanding the case for further consideration in light of *Jones v. Flowers*, 547 U.S. 220 (2006), is reported as *Estate of Lowe v. Apex Tax Investments, Inc.*, 126 S. Ct. 2287 (2006). The now-vacated prior opinion of the Supreme Court of Illinois (Pet. App. 31a-73a.) is reported as *In re Application of County Collector*, 838 N.E.2d 907 (Ill. 2005). The order of the Appellate Court of Illinois, First Judicial District, affirming the Circuit Court of Cook County's denial of the petition to set aside tax deed (Pet. App. 74a-92a), is not reported. The memorandum opinion of the Circuit Court of Cook County granting partial summary judgment in favor of petitioner (Pet. App. 112a-17a) is not reported. The orders of the Circuit Court of Cook County denying petitioner's motion for summary judgment (Pet. App. 111a) and denying the petition to set aside tax deed (Pet. App. 93a) are not reported. The order of the Circuit Court of Cook County issuing the tax deed (Pet. App. 118a-20a) is not reported.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on April 19, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. XIV, § 1 provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

Section 22-15 of the Illinois Property Tax Code, 35 ILCS 200/22-15, provides in relevant part:

> The purchaser or his or her assignee shall give the notice required by § 22-10 by causing it to be published in a newspaper as set forth in § 22-20. In addition, the notice shall be served by a sheriff . . . upon owners who reside on any part of the property sold by leaving a copy of the notice with those owners personally.
>
> * * *
>
> The same form of notice shall also be served upon all other owners and parties interested in the property, if upon diligent inquiry they can be found in the county, and upon the occupants of the property in the following manner:
>
> (a) as to individuals, by (1) leaving a copy of the notice with the person personally or (2) by leaving a copy at his or her usual place of residence with a person of the family, of the age of 13 years or more, and informing that person of its contents. The person making the service shall also cause a copy of the notice to be sent by

> registered or certified mail, return receipt requested, to that party at his or her usual place of residence . . .
>
> * * *
>
> If any owner or party interested, upon diligent inquiry and effort cannot be found or served with notice in the county, then the person making the service shall cause a copy of the notice to be sent by registered or certified mail, return receipt requested, to that party at his or her residence, if ascertainable.

Section 22-40(a) of the Illinois Property Tax Code, 35 ILCS 200/22-40(a), provides in relevant part:

> If the redemption period expires and the property has not been redeemed . . . and the notices required by law have been given . . . and the petitioner has complied with all the provisions of law entitling him or her to a deed, the court shall so find and shall enter an order directing the county clerk . . . to issue to the purchaser or his or her assignee a tax deed. The court shall insist on strict compliance with §§ 22-10 through 22-25.

Section 22-45 of the Illinois Property Tax Code, 35 ILCS 200/22-45, provides in relevant part:

> Tax deeds issued under § 22-40 are incontestable except by appeal from the order directing the county clerk to issue the tax deed. However, relief from such order may be had under § 2-1401 of the Code of Civil Procedure in the same manner and to the same extent as may be had under that Section with respect to final orders and judgments in other proceedings. The grounds for relief under § 2-1401 shall be limited to: . . .

(3) proof by clear and convincing evidence that the tax deed had been procured by fraud or deception by the tax purchaser or his or her assignee; or

(4) proof by a person or party holding a recorded ownership or other recorded interest in the property that he or she was not named as a party in the publication notice as set forth in § 22-20, and that the tax purchaser or his or her assignee did not make a diligent inquiry and effort to serve that person or party with the notices required by §§ 22-10 through 22-30.

STATEMENT OF THE CASE

This petition for a writ of certiorari is the second filed in this case. In 2006, this Court granted the first petition, vacated the judgment of the Illinois Supreme Court, and remanded the case for further consideration in light of *Jones v. Flowers*, 547 U.S. 220 (2006). On remand, the Illinois court reaffirmed its prior decision, essentially holding that this Court's decision in *Jones* should be limited to its facts or, at least, to the precise type of statutory scheme involved in that case. The Illinois court held that due process does not require notice or hearing prior to the time that a homeowner's title and property interest are totally extinguished, so long as some effort at notice was made at the time of the tax sale two years before, and, further, that the party responsible for giving notice is entitled to ignore new information as to the owner's whereabouts, so long as some effort to find the owner previously had been made.

Background

In 1977, Mary Lowe purchased a single-family home located at 13250 South Riverdale in Cook County, Illinois.

(C 56.)[1] Ms. Lowe regularly paid all property taxes until 1991, when she failed to pay $110.65. (C 4.)

Ms. Lowe suffered from chronic disorganized schizophrenic disorder, and was hospitalized 27 times between 1964 and 1996. (SR II 25-26.) The death in 1994 of her companion, William Austin, triggered a renewed schizophrenic episode (EX 261); Ms. Lowe suffered the delusion that Mr. Austin was still alive, and she continued to live with his decomposing body until January 4, 1995, when the Chicago police found her walking naked outdoors and thereupon discovered Mr. Austin's remains. (C 29; EX 95-96.) Ms. Lowe was hospitalized, but later released to an outpatient treatment program. (EX 95-96, 130.) Ms. Lowe's final 16-month hospitalization, at Tinley Park Mental Health Center ("TPMHC"), a state mental hospital, lasted from August 26, 1995 until December 16, 1996. (SR II 26, 32; EX 96, 131.) It was during that period that respondent Apex Tax Investments, Inc. ("Apex") secured ownership of Ms. Lowe's home by prosecuting a petition for issuance of a tax deed in the Circuit Court of Cook County. (Pet. App. 118a-120a.) Ms. Lowe, who was released to the custody of her son on December 16, 1996, never received notice of the tax deed proceeding. (SR II 26, 32; EX 96, 131.) She died November 15, 1998, two days after her 72nd birthday. (C 57, 451.)

Ms. Lowe's mental illness was well-known in her neighborhood. (SR II 60-61, 83.) Jewel Hightower, a letter

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[1] The record consists of 10 volumes: a four-volume record consisting of a consecutively-paginated three-volume common-law record ("C") and a one-volume report of proceedings ("R"); a three-volume supplemental record containing a one-volume common-law record ("SR") and a nonconsecutively-paginated two-volume report of proceedings ("SRII" and "SRIII"); and a consecutively-paginated three-volume supplemental record containing the exhibits admitted in evidence at the evidentiary hearing of February 20, 2002 ("EX").

carrier whose route included Ms. Lowe's home from 1991 forward, was aware of Ms. Lowe's mental illness, as were Ms. Lowe's neighbors. (SR II 54-58, 60-61, 82-83, 85-87.) According to Ms. Hightower, Ms. Lowe exhibited a variety of strange behaviors, including coming outside undressed, shouting names and obscenities, moving her furniture to the curb, and screaming at passersby. (SR II 56-57, 60-61.) Such episodes often were followed by periods of hospitalization. (SR II 58.) Ms. Hightower would hold Ms. Lowe's mail during her hospitalizations. (SR II 58-59, 62, 82.) Until her last hospitalization in August 1995, Ms. Lowe would call the post office when she returned home, and Ms. Hightower would then deliver Ms. Lowe's mail. (SR II 58-59.)

Apex's Tax Deed Petition and Attempts at Giving Notice

On March 3, 1993, Apex purchased Ms. Lowe's home for $347.61, and received a "certificate of purchase," at a tax sale authorized by Articles 22 and 23 of the Illinois Property Tax Code, 35 ILCS 200/21-190 *et seq.* and 22-5 *et seq.* (the "Code"). (C 2, 4.)[2] Under the Code, Ms. Lowe was entitled to redeem the property by paying the unpaid taxes, plus certain expenses, before the redemption period expired on February 21, 1996. *See* 35 ILCS 200/21-345 through 21-355. The Code contains no requirement that any notice be given to a homeowner during the period between the time of the tax sale notice and the time of the notice of the filing of the tax deed petition, which is approximately 22 months.

On October 5, 1995, Apex filed a tax deed petition in the Circuit Court of Cook County. (C 2-4.) Apex was then

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[2] This amount included the amount of delinquent 1991 property taxes ($110.65), interest, and statutory fees. (C 4.)

required to comply with certain statutory notice provisions, including the publication of notice in a newspaper published within Cook County and service of notice by the Sheriff. *See* 35 ILCS 200/22-10 through 22-25. For purposes of effecting service, Apex was required by statute to undertake a "diligent inquiry" to locate the owner and other interested parties not residing on the property. *See* 35 ILCS 200/22-15.

On October 26, 1995, the Sheriff visited the property to effectuate service on Ms. Lowe, Mr. Austin (a co-owner), and "occupant." (C 11-13.) On November 9, 1995, the Sheriff filed with the Circuit Court a return of service reporting that he was unable to serve anyone at the property, which he reported to be "vacant per neighbors." (*Id.*) As required by statute, the Sheriff thereafter sent notices by certified mail addressed to the property and directed to Ms. Lowe, Mr. Austin, and "occupant" on November 8, 1995. (C 54-55.)

Ms. Hightower, the letter carrier, later testified that she became concerned when she received the Sheriff's letters because she recognized their potential importance. (SR II 64-65, 79-80.) Ms. Hightower knew that Ms. Lowe was hospitalized at TPMHC. (SR II 65, 75-76, 82.) Ms. Hightower duly recorded the fact of Ms. Lowe's hospitalization at the branch post office. (SR II 72, 82-84.)

Ms. Hightower marked the envelopes addressed to Ms. Lowe and "occupant" with her initials (JHT), her postal route number (2719), and the annotation "Person is Hospitalized", and returned them to sender after three delivery attempts. (C 54; SR II 66-70, 79.) She wrote "deceased" on the letter addressed to Mr. Austin and also returned it to sender. (C 15.) On November 22, 1995, the Sheriff filed the letter addressed to Mr. Austin with the court. (C 15.) He filed the other returned notices on January 2, 1996. (C 54.)

Fred Berke, the president of Apex, later testified that he visited the property sometime between September 21 and November 21, 1995. (Pet. App. at 113a.) No one answered the door. (*Id.* at 123a.) Mr. Berke looked in a window and noticed that the living room had no furniture. (*Id.*) He spoke with Ms. Lowe's next-door neighbor, who said that Ms. Lowe owned the property, but that no one was currently living there. (*Id.* at 124a.) In his *ex parte* testimony, Mr. Berke did not say whether he asked the neighbor how Ms. Lowe might be reached.

By reviewing a "print out tract search," a deed, and public records, Apex determined that Starks & Boyd, P.C., represented Ms. Lowe in 1993, when she quitclaimed a part interest in the property to Mr. Austin, and that First National Bank of Chicago had previously been a mortgagee. (*Id.* at 124a-25a.) The Sheriff served both parties between October 24 and 26, 1995. (Pet. App. at 125a; C 14.)

Apex caused the Clerk of the Circuit Court to send notices to Ms. Lowe, Mr. Austin, "occupant," Starks & Boyd, P.C., and First National Bank of Chicago (the same parties served by the Sheriff) by certified mail on November 8, 1995. (Pet. App. at 125a-27a; C 6-10.) After unsuccessful delivery attempts on November 9, 15, and 24, the first three notices were returned by the Postal Service and filed by the Clerk of Court on November 29 and 30. (C 16, 547.)

Apex also gave notice by publication in The Chicago Daily Law Bulletin, a legal trade publication in Chicago, on October 11, 12, and 13, 1995. (Pet. App. at 126a.) Apex never personally served Ms. Lowe, who was hospitalized at TPMHC from August 26, 1995 until December 16, 1996.

The Tax Deed Hearing

On March 6, 1996, Apex filed an Application for an Order Directing the County Clerk to Issue a Tax Deed. (C 18.) On March 18, 1996, the Hon. Marjan Staniec held an *ex parte* hearing on the application. (Pet. App. at 121a-28a.)

The transcript of the *ex parte* proceeding is nine pages, including the title page. (*Id.* at 121a-28a.) Apex's attorney, Jonathan Smith, called Apex president Fred Berke as his only witness, and Mr. Berke's testimony consists of 34 lines. (*Id.* at 123a-24a.) Mr. Berke, who did not identify himself or explain his relationship to Apex, testified that he visited the property and spoke to Ms. Lowe's neighbor, who said that Ms. Lowe was the owner of the property, but that no one was living there. (*Id.*) Mr. Berke apparently did not ask the neighbor how Ms. Lowe could be reached, and he did not disclose the purpose of his visit. (*Id.*) He did not ask whether anyone else might know where to find Ms. Lowe. Nor did he inquire about Ms. Lowe's reputation in the neighborhood. (*Id.*)

Apex's lawyer then summarized Apex's attempts at notice. (*Id.* at 124a-27a.) He noted that the Sheriff had sent certified letters to Ms. Lowe and Mr. Austin after failing to obtain personal service on them. (*Id.* at 125a-26a.) Mr. Smith offered the returned envelopes in evidence, but made no mention of the notations as to Ms. Lowe's hospitalization or Mr. Austin's death. (*Id.*) Mr. Smith further asserted that no incompetents appeared to have an interest in the property. (*Id.* at 127a.) Judge Staniec admitted the envelopes in evidence, but did not inquire about the notations. (*Id.* at 126a.)

Judge Staniec asked one substantive question of Mr. Smith: "[W]hat were the diligent efforts you made to try to

locate the whereabouts of Mary Lowe and William Austin, Sr.?" (Pet. App. at 127a.) Mr. Smith responded:

> We checked all the city and suburban phone directories and were unable to find any listing or address for Mary Lowe or William Austin. All of our regular efforts proved fruitless and that's why we sent the notice to who we assume to be their attorneys, Starks and Boyd. We also placed a call to Starks & Boyd, and they would not give us an address, and indicated we should send the notice to them.

(*Id.*) Apex also determined that Ms. Lowe was registered to vote at her home. (*Id.* at 125a). Judge Staniec concluded that Ms. Lowe's redemption period had expired, that no redemption had occurred, and that Apex had exercised due diligence in ascertaining the identity of interested parties and their whereabouts. (*Id.* at 127a-28a.)

On May 20, 1996, Judge Staniec entered a written order, finding that Apex had met the statutory requirements for a tax deed and ordered its issuance.[3] (Pet. App. 118a-20a.) The Clerk issued the deed on the same day, and it was recorded on June 5, 1996. (EX 68-71.)

Proceeding to Set Aside the Tax Deed

On September 5, 1997, Ms. Lowe's two sons filed a *pro se* petition asking that the Circuit Court set aside the tax deed, based on Ms. Lowe's hospitalization at TPMHC. (C 23-24.) Judge Staniec then appointed the Public Guardian as Ms. Lowe's attorney and guardian ad litem. (C 541-44.)

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[3] After retiring, Judge Staniec gave an affidavit stating that he would not have granted Apex's application had he known of Ms. Hightower's notations. (C 541-42.)

On November 10, 1997, the Public Guardian filed a Petition to Set Aside Tax Deed and Stay Order of Possession under Section 2-1401 of the Illinois Code of Civil Procedure and Section 22-45 of the Property Tax Code. (C 29-32.) An Amended Petition was filed on April 17, 1998. (C 46-52.) The Public Guardian asserted that Apex had notice of Ms. Lowe's hospitalization by virtue of Ms. Hightower's notations on the returned letters. Apex, by failing to make any further inquiry of Ms. Hightower or the Postal Service, therefore failed to undertake the diligent inquiry required by *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). (C 46-51.)

On December 6, 1996, Apex had entered into an installment sale contract with John Herndon, an associate of Mr. Berke (C 239-42, 299-300), who agreed to pay Apex $10,000 for Ms. Lowe's home. (C 85-92.) On August 12, 1998, John Herndon moved to dismiss the Public Guardian's petition. (*Id.*) On April 14, 1999, the Public Guardian moved for partial summary judgment, seeking a determination that Mr. Herndon was not a *bona fide* purchaser because his contract was executory and he had actual notice of Ms. Lowe's claim. (C 161-65.)

Judge Staniec granted the Public Guardian's motion after hearing arguments. (R 53-94). Judge Staniec concluded that Apex had actual or constructive knowledge, at the time of the March 18, 1996 *ex parte* hearing, that Ms. Lowe was hospitalized and had not received notice:

> Apex "knew" or "should have known" that respondent was in the hospital. It had either actual or constructive notice of the circumstances. Actual if it had exercised due diligence in reviewing the court file before the [March 18, 1996] prove-up, or constructive notice if it failed to exercise due diligence. Apex should or would

> have noted the Post Office notation on the return envelope – and likely would not have filed an affidavit of complying with due diligence in its inquiry and service of notice as required by the Property Tax Code.

(Pet. App. at 114a-15a.) Judge Staniec further held that Apex's knowledge should be imputed to Mr. Herndon. (*Id.* at 116a.)

On September 17, 1999, after Judge Staniec retired, the Public Guardian moved for summary judgment on its Amended Petition. (C 370-76.) On February 16, 2000, Judge Nancy Arnold denied the motion and set the matter for trial. (Pet. App. 111a.) The case was tried by Judge Edward O'Brien on February 20, 2002. Only the Public Guardian presented evidence.

Jewel Hightower, the letter carrier, testified about Ms. Lowe's mental illness and bizarre behaviors, based on personal observations and on conversations with neighbors. (SR II 56-58, 60-61, 82-83, 86-87.) Ms. Hightower also explained how she marked the letters addressed to Ms. Lowe, Mr. Austin, and "occupant," which Apex offered in evidence at the *ex parte* tax-deed hearing. (SR II 64-71.) Ms. Hightower further testified that no one ever contacted anyone at the post office concerning the letters. (SR II 74-79.) If someone had asked her, she would have reported that Ms. Lowe was hospitalized at TPMHC, and the same information was available at the branch post office. (SR II 74-76, 80-81, 84.)

The Public Guardian also called Dr. Bernard Rubin, a psychiatric expert who had examined Ms. Lowe's health records. He testified that Ms. Lowe suffered from chronic disorganized schizophrenic disorder, the most severe form of schizophrenia. (SR II 18, 21-26, 31, 49, 104-105; EX 97-126.)

On April 9, 2002, Judge O'Brien denied the Amended Petition. (Pet. App. 93a; 94a-110a.) Judge O'Brien concluded that Ms. Lowe was hospitalized and incompetent, but that Apex could not be charged with knowledge of Ms. Lowe's mental illness simply by virtue of Ms. Hightower's notations. (*Id.* at 101a, 103a-104a.) Judge O'Brien did not upset Judge Staniec's prior finding that Apex was charged with knowledge that Ms. Lowe was hospitalized and had not received actual notice of the tax deed proceeding (*id.* at 103a), but nonetheless held that Ms. Lowe had not been denied due process because Apex had no reason to believe that Ms. Lowe was incompetent. (*Id.* at 100a, 103a-104a.)

Illinois Appellate Court Proceeding

On appeal to the Appellate Court of Illinois, First District, the Public Guardian argued that the notations put Apex on notice that Ms. Lowe was hospitalized and had not received actual notice, even if they did not establish incompetence. The Public Guardian also showed that Ms. Lowe's whereabouts were ascertainable through the exercise of constitutionally required diligence. (App. Ct. Br. 38-40.)

The Appellate Court affirmed. (Pet. App. 74a-92a.) Like the trial court, the Appellate Court concluded that Apex's knowledge of Ms. Lowe's hospitalization did not provide knowledge as to her mental incapacity. (Pet. App. 84a.) The Appellate Court did not consider whether Apex's knowledge of Ms. Lowe's hospitalization required it to undertake reasonable, additional investigation to ascertain her whereabouts.

The First Illinois Supreme Court Proceeding

On appeal to the Supreme Court of Illinois, the Public Guardian again urged that the notations put Apex on notice that Ms. Lowe was hospitalized, that Apex had a duty to

investigate further as to Ms. Lowe's whereabouts, and that any such investigation would have resulted in finding Ms. Lowe at TPMHC, therefore providing Apex with knowledge of Ms. Lowe's mental illness. (Ill. Sup. Ct. Br. 38.)

The court rejected these arguments. First, the court held that the Public Guardian had not made the showing of fraud or deception required to set aside a tax deed under Illinois statutory law. (Pet. App. 55a.) Second, the court held that it lacked the power under Illinois law to set aside the tax deed on equitable grounds. (Pet. App. 56a.) Third, the court, *sua sponte*, held that the trial court's *ex parte* finding of "diligent inquiry" (based on Illinois state standards) precluded any federal constitutional challenge to the sufficiency of Apex's efforts. (Pet. App. 67a.) Finally, the court categorically rejected all of the Public Guardian's other due process claims. (Pet. App. 68a-72a.)

The First Petition for a Writ of Certiorari

The Public Guardian filed a Petition for a Writ of Certiorari, raising three questions: (1) whether the Due Process Clause requires a person charged with giving notice to make additional efforts to locate a homeowner when mailed notice is returned as undeliverable; (2) whether a person charged with giving notice is required by the Due Process Clause to undertake additional reasonable efforts to provide actual notice when an undelivered, returned notice reveals specific information that is reasonably likely to lead to discovery of the homeowner's actual whereabouts or incapacity; and (3) whether a finding of "due diligence," made as a matter of state law in an *ex parte* proceeding, may be used to foreclose a party who did not receive any actual notice of the proceeding from challenging the sufficiency, on federal constitutional grounds, of efforts to discover her whereabouts.

On May 22, 2006, the Court granted the petition, vacated the judgment of the Illinois court, and remanded for further consideration in light of *Jones v. Flowers*, 547 U.S. 220 (2006).

Illinois Supreme Court Proceeding on Remand

On remand, the Public Guardian argued that, in light of this Court's decision in *Jones*, the notice given to Ms. Lowe plainly violated the Due Process Clause because (1) Apex failed to follow up on specific information on the returned notices that likely would have led to the discovery of Ms. Lowe's whereabouts and incapacity, and (2) even absent the specific information, Apex did not make a constitutionally sufficient attempt to find Ms. Lowe. (Supp. Br. at 11-20.) The Public Guardian also argued that the Illinois court's previous holding that Ms. Lowe was precluded by state statute from challenging the constitutional sufficiency of Apex's attempts to give her actual notice was itself contrary to the Constitution. (Supp. Br. at 20-28.)

With only five of seven Justices participating, the Illinois court reaffirmed its prior decision. The court distinguished *Jones* on the ground that *Jones* involved notice of a tax sale rather than a proceeding to authorize issuance of a tax deed. (Pet. App. 17a-18a.) Although the record was silent as to whether Ms. Lowe received the notice of sale, the court concluded that "[b]ecause there is no issue in this case concerning whether Lowe was given notice of the tax sale, we find that the due process concerns in *Jones* are not at issue in this case and, therefore, that *Jones* does not require this court to reverse its prior opinion." (*Id.* at 18a.) The notice that Ms. Lowe failed to receive was notice of the expiration of the redemption period and initiation of a tax-deed proceeding that would extinguish her rights to the

property, both of which occurred approximately two years after the tax sale.

The Illinois court also held that Apex had complied with *Jones* in any event. The court concluded that the notations on the returned envelopes were not sufficient to require Apex, as a matter of federal constitutional law, to take additional reasonable steps to provide notice. (*Id.* at 19a-21a.) In the court's view, Apex had already taken reasonable steps to provide notice before the envelopes were returned, and was therefore entitled to ignore the new information. (*Id.* at 21a-23a.)

Finally, the court declined to revisit its previous holding that persons (like Ms. Lowe) who had not appeared at a tax-deed proceeding because they had not received notice of it, were nonetheless properly precluded by state law from challenging the federal constitutional sufficiency of the tax scavenger's efforts to give notice. (*Id.* at 23a.)

Justice Kilbride dissented. In his view, this Court's reasoning in *Jones* required reversal of the Illinois court's prior holding as to the constitutional sufficiency of Apex's efforts. Justice Kilbride agreed that *Jones* involved notice at an earlier stage of the deprivation of property, but found that the instant case presented an even stronger need for constitutional protection because this was the *last* stage at which the homeowner's property interest could be protected from final and irrevocable extinction. According to Justice Kilbride, the notice in this case was the last notice "before the owner is actually stripped of title to the property" and "provide[d] the *final opportunity* for the property owner to preserve *any interest* in the property." (*Id.* at 25a.) Justice Kilbride also pointed to the key factual similarity between *Jones* and this case: "In both instances, after it became apparent that the property owner had not received the

statutory notice, the party obliged to provide notice 'did – nothing'." (*Id.* at 26a (quoting *Jones*, 457 U.S. at 234).) After noting that "[t]he goal of due process is not to minimize the notification burden placed on the tax purchaser" (who frequently purchases property at a fraction of its value, as here), but to afford the homeowner an adequate opportunity to protect her property rights, Justice Kilbride concluded that additional reasonable steps to locate Ms. Lowe were constitutionally required once the envelopes were returned with the notation "person is hospitalized." (*Id.* at 29a.)

REASONS FOR GRANTING THE PETITION

I. THE QUESTION WHETHER DUE PROCESS REQUIRES THAT A HOMEOWNER RECEIVE CONSTITUTIONALLY SUFFICIENT NOTICE OF THE HEARING AT WHICH THE STATE MAY TAKE HER HOME FOR NON-PAYMENT OF TAXES, AT WHICH POINT HER PROPERTY INTEREST MAY BE FULLY AND FINALLY EXTINGUISHED, IS AN IMPORTANT QUESTION WARRANTING REVIEW BY THIS COURT.

The Illinois Supreme Court distinguished this Court's decision in *Jones* on the ground that *Jones* addressed the constitutional sufficiency of the notice given before the sale of Jones's house, whereas this case involves a challenge to the sufficiency of the notice given at a different stage, that is, at the time of the hearing, held two years after the tax sale, at which Ms. Lowe's title and property interest were fully and finally extinguished. (Pet. App. 17a-18a.)

In other words, the Illinois court concluded that minimum due process requirements are met if a party has notice of the first event affecting her property rights – the sale of her home at a tax sale – even though her ownership is not actually

extinguished until a separate hearing is held two years later.[4] However, *Jones* clearly applies to this case, and a homeowner is entitled to receive notice of the proceeding at which her property rights will be extinguished.

A. *Jones* Requires Summary Reversal Because, Under Illinois Law, A Homeowner's Property Is Actually Taken At The Tax-Deed Hearing, Not At The Tax Sale, And This Case Is Therefore Indistinguishable From *Jones*.

The central meaning of *Jones* is that reasonable efforts at giving notice must be made before a homeowner can be deprived of her property. In that respect, *Jones* reiterates the long-standing principle that "the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982). It necessarily follows that notice must be given at the time that the property may be finally and irrevocably lost. *See, e.g., Tulsa Prof'l Collection Serv., Inc. v. Pope*, 485 U.S. 478, 484 (1988) ("[S]tate action affecting property must generally be accompanied by notification of that action"). That must be true, regardless of any prior notice that may have been given at any prior stage, because the proceeding in which title may finally and irretrievably be lost is the

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[4] In fact, the record does not show whether Ms. Lowe actually received notice of the tax sale. The Circuit Court found that Apex complied with the statutory provisions requiring that it send notice of the tax-deed petition near the end of the redemption period (Pet. App. at 118a), but the Circuit Court had no occasion to make any finding as to whether Ms. Lowe received notice of the tax sale, and no evidence regarding those notices was adduced at the tax-deed hearing. Moreover, whether Ms. Lowe received notice of the tax sale was not an issue in this case until it was raised *sua sponte* by the Illinois Supreme Court, at which time Ms. Lowe was deceased.

proceeding that affords the homeowner her "last clear chance" to preserve her property.

Jones makes clear that the actual taking of the property is a key event for due process purposes: "[B]efore forcing a citizen to satisfy his debt by forfeiting his property, due process requires the government to provide adequate notice of the impending taking." 547 U.S. at 234. *Jones*, then, is the most recent reiteration of this Court's consistent holding that giving notice of the proceeding at which the state will actually take property is a core due process requirement. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (notice must be given "at a time when the deprivation can still be prevented"); *Logan*, 455 U.S. at 434.

The Illinois court purported to distinguish *Jones* by relying on a difference between the Illinois statutes at issue in this case and the Arkansas statutes involved in *Jones*. But that difference is immaterial. In Illinois, as in many other states, the taking of a homeowner's property for delinquent taxes happens in two distinct steps. The first major step is the sale of the property at a tax sale after which the purchaser of the property receives a "certificate of purchase." 35 ILCS 200/21-205, 21-250. The tax sale triggers a 30-month redemption period. The homeowner may redeem the property by paying back taxes, along with certain penalties and interest. *See* 35 ILCS 200/21-345 *et seq.*

The last step in Illinois is the tax scavenger's filing and prosecution of a petition for issuance of a tax deed near the

end of the two-year redemption period. 35 ILCS 200/22-30. The Illinois statute requires the tax scavenger to make "diligent inquiry" to locate the homeowner and to send notice of the petition, including the date on which the court will hear the petition, between three and five months before the expiration of the redemption period. 35 ILCS 200/22-10 *et seq.* If the homeowner did not receive notice and does not appear, the hearing may be conducted *ex parte*. The Circuit Court orders the issuance of a tax deed so long as the tax scavenger shows: (a) that the redemption period has expired, (b) that all taxes and special assessments have been paid, and (c) that there has been strict compliance with the statutes requiring notice of the tax-deed petition. 35 ILCS 200/40(a). The deed is incontestable except on four narrow statutory grounds. 35 ILCS 200/45.

The Arkansas statutes in *Jones* required that the Commissioner of State Lands, at the beginning of a two-year redemption period, send a notice to the affected homeowner stating that his property will be sold if it is not redeemed within the two-year period. *See* Ark. Code Ann. § 26-37-301 (1997); *Jones*, 547 U.S. at 223. At the end of the two-year redemption period, the property may be sold and, after a brief, 30-day post-sale redemption period, the Commissioner will issue a tax deed as a matter of course. Ark. Code Ann. § 26-37-202(e) (1997), *Jones*, 547 U.S. at 224. Arkansas had no statutory requirement that a second notice be sent shortly before the sale actually occurs and the homeowner's property interest is extinguished.[5]

The two schemes are different in that the tax sale and issuance of a tax-deed are separated by a 30-month redemption period in Illinois, but constitute a single event at

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[5] Arkansas amended its statutes in 2003, but the tax sale at issue in *Jones* was governed by the pre-amendment version of the statutes.

the end of the two-year redemption period in Arkansas. However, that distinction has no legal significance here. As the Illinois Supreme Court acknowledged in its opinion, "[t]he certificate of purchase [issued at the tax sale] did not affect Lowe's legal or equitable title to the property." (Pet. App. 4a.) Rather, the actual taking occurred at the conclusion of the tax-deed petition, after the expiration of a 30-month redemption period – the very events as to which Ms. Lowe received no notice. Under the Arkansas statutes, by contrast, the tax-sale is the actual taking because the state issues automatically a tax deed that extinguishes the homeowner's property rights 30 days after the sale. *See* Ark. Code Ann. § 26-37-202(e).

This Court's holding in *Jones* clearly applies to this case because the state extinguished Ms. Lowe's remaining interest in her property by issuing an incontestable tax deed at the tax-deed proceeding. The Illinois court's conclusion that *Jones* does not apply because the *Jones* notice pertained to a tax sale rather than a tax deed is plainly incorrect and warrants summary reversal.

B. If *Jones* Itself Is Limited To Tax Sales, This Court Should Grant Review To Resolve A Split In The Lower Courts On Whether Due Process Requires Notice Of The Tax-Deed Proceeding In Addition To Any Notice Of The Tax Sale.

Even if the Illinois court's narrow reading of the holding in *Jones* were correct, the principle animating *Jones* clearly requires reversal. But the Court appears to have reserved that issue, as a technical matter, in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), and the lower courts are split on that question. Thus, if this Court believes that the Illinois court is technically correct as to the scope of the *Jones* holding, this Court should grant review to resolve that

remaining uncertainty and hold that, in states that use a two-stage process like Illinois', due process requires notice of both the tax sale and the later tax-deed proceeding.

In *Mennonite*, this Court addressed a statutory scheme nearly identical to that involved here. Mennonite Board, the mortgagee, did not receive notice of either the tax sale or the filing of an application for the issuance of a tax deed at the conclusion of the redemption period. *Mennonite Board*, 462 U.S. at 794-95. After Adams (the tax purchaser) received the tax deed, he filed a quiet title action, which Mennonite Board opposed, arguing that "it had not received constitutionally adequate notice of the pending tax sale and of the opportunity to redeem the property following the tax sale." *Id.* at 795. This Court found that the tax sale "immediately and drastically diminished the value" of Mennonite's interest in the property, and that Mennonite was therefore constitutionally entitled to notice of the tax sale. *Id.* at 798. Because the Court held that Mennonite's due process rights had been violated at the first stage, the Court had no reason to decide whether due process required that notice also be afforded at the second stage. The Court therefore reserved judgment on that issue. *Id.* at 800 n.6.

Prior to this Court's decision in *Jones*, the Indiana Supreme Court held, with respect to the same statutory scheme, that "the due process clause . . . does not require that actual notice be given of either the lapse of the redemption period or the subsequent issuance of the tax deed." *Calhoun v. Jennings*, 512 N.E.2d 178, 184 (Ind. 1987). Several other states have reached the same conclusion. *See Weigner v. City of New York*, 852 F.2d 646, 652 (2d Cir. 1988) ("[D]ue process only requires notice of the 'pendency of the action' and an opportunity to respond" and does not require notice of the end of the redemption period and the final proceedings

terminating property rights); *Hamilton v. Royal Int'l Petroleum Corp.*, 934 So. 2d 25, 32 (La. 2006), *cert. denied*, 127 S. Ct. 937 (2007) (holding that post-sale notice is not constitutionally required because "[t]he notice informing the property owner his taxes are delinquent and his property will be sold if the taxes are not paid protects the procedural due process rights of the property owner"); *Cummings v. Town of Oakland*, 430 A.2d 825, 832 (Me. 1981) ("When the state gratuitously provides by statute for an additional warning by notice of 'impending automatic foreclosure' as was done here, that second notice is not itself of constitutional magnitude . . . .").

The New Hampshire Supreme Court, on the other hand, could "not see how due process [could] be read, as in *Mennonite*, to require actual notice . . . of a tax sale, but not to require notice, as here, of a tax deeding" because the "end of the redemption period . . . is an event that has far greater significance to both the owner and the mortgagee. When the redemption period lapses, the holder of the lien is entitled to exchange the lien for a tax deed, thereby acquiring the property free and clear of all other interests." *First NH Bank v. Town of Windham*, 639 A.2d 1089, 1094 (N.H. 1994). The New Hampshire court ultimately held that "fundamental fairness under the New Hampshire Constitution" required notice of the final proceeding. *Id.* at 1095.

Other courts have concluded that federal due process requires notice of the proceeding at which the homeowner's property rights will be finally extinguished. *See Vosilla v. Rosado*, 944 So. 2d 289, 299-301 (Fla. 2006) (applying *Jones* to the tax collector's attempts to serve notice of final proceedings at end of redemption period); *Hamilton v. Renewed Hope, Inc.*, 589 S.E.2d 81, 83-84 (Ga. 2003) (holding that "[n]otice of the tax sale and notice of the

foreclosure of the right to redeem are distinct events" and both are subject to due process); *St. George Antiochian Orthodox Christian Church v. Aggarwal*, 603 A.2d 484, 486-87, 491 (Md. 1992) (applying federal due process standards to final stage terminating right of redemption and extinguishing property rights); *In re Foreclosure of Liens for Delinquent Taxes*, 607 N.E.2d 1160, 1163 (Ohio Ct. App. 1992) (holding that mortgagee was constitutionally entitled to notice of tax foreclosure sale even though the mortgagee had earlier notice of the pendency of the foreclosure proceeding); *see also Acirema, N.V. v. Lilly*, No. 96-0559, 1997 WL 876738 *4 (S.D.W. Va. April 11, 1997), *aff'd*, 141 F.3d 1157 (4th Cir. 1998) (holding that failure to provide notice of tax sale did not offend due process where actual post-sale notice of right to redeem before final termination of property rights).

In sum, under the due process principles reaffirmed in *Jones*, Ms. Lowe was entitled to constitutionally adequate notice of the tax-deed proceeding, even if she received notice of the tax sale more than two years before. The right to notice and hearing clearly attaches to a proceeding at which a person's property interest will be extinguished. The Illinois court's contrary holding is clearly incorrect and warrants summary reversal by this Court. Alternatively, if the Court concludes that the precise issue presented in this case was left open in *Mennonite* and not addressed with sufficient directness in *Jones*, the Court should take this opportunity to further clarify the law in this area, and resolve the continuing split in the lower courts, either by granting plenary review, or simply by issuing an opinion to reiterate the primacy of *Jones* in this area.

II. THE QUESTION WHETHER THE PARTY REQUIRED TO PROVIDE CONSTITUTIONALLY SUFFICIENT NOTICE MAY IGNORE AN UNDELIVERED, RETURNED NOTICE, WHICH CONTAINS NEW INFORMATION, SIMPLY BECAUSE THE PARTY TOOK SOME REASONABLE STEPS TO PROVIDE ACTUAL NOTICE BEFORE THE NOTICE WAS RETURNED, IS AN IMPORTANT QUESTION WARRANTING REVIEW BY THIS COURT.

On remand, the Illinois court was "not convinced that . . . Apex was required to take additional steps in response to Hightower's notations on the certified mail envelopes." (Pet. App. 21a.) The Illinois court held that *Jones* did not require reasonable additional steps based on the new information – the notations on the returned envelopes that "person is hospitalized" together with the letter carrier's initials and route number – because Apex previously had taken some reasonable steps to provide notice before receiving the new information. (*Id.* at 19a-23a.)

That holding cannot be reconciled with *Jones*. In *Jones*, this Court reaffirmed that due process requires that "any proceeding which is to be accorded finality" requires notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action" and employs "means . . . such as one desirous of actually informing the absentee might reasonably adopt to accomplish [giving notice]." *Mullane*, 339 U.S. at 314, 315.

Sharpening the *Mullane* inquiry in *Jones*, the Chief Justice noted that it would not be reasonable for the tax collector to do nothing if, for example, he saw the letter carrier accidentally drop a stack of notices down a storm

drain, and therefore knew that the notices had not been delivered:

> No one "desirous of actually informing" the owners would simply shrug his shoulders as the letters disappeared and say "I tried." Failure to follow up would be unreasonable . . . .

547 U.S. at 229. In other words, the fact that someone has taken reasonable steps to give notice cannot, as a constitutional matter, excuse him from attempting additional steps once he knows those initial steps failed.[6] Moreover, *Jones* specifically considers what additional steps reasonably may be required because of the information garnered from the returned notice. *Jones*, 547 U.S. at 234 ("What steps are reasonable . . . depends upon what the new information reveals.") Here, the Illinois court held the opposite: that Apex was excused from any constitutional duty to follow up on new information simply by virtue of certain steps it took before receiving the new information. The Illinois court's disregard of this Court's decision could not be more direct.

The notations provided by Ms. Hightower are precisely the sort of information that requires additional steps:

> Even occupants who ignored certified mail notice slips addressed to the owner (if any had been left) might scrawl the owner's new address on the notice packet and

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[6] As noted in *Jones*, "[t]here is no reason to suppose that the State will ever be less than fully zealous in its efforts to secure the tax revenue it needs. The same cannot be said for the State's efforts to ensure that its citizens receive proper notice before the State takes action against them." 547 U.S. at 239. The Court's observation suggests that, in evaluating what steps are reasonable and necessary, it is useful to consider whether one who is owed money (as opposed to one who hopes to acquire property at a bargain price if the owner remains unfound) would take those steps to collect the debt that he is owed.

> leave it for the postman to retrieve, or notify Jones directly.

Jones, 547 U.S. at 235. The notations clearly indicated that Ms. Hightower knew Ms. Lowe's whereabouts. Moreover, Ms. Hightower testified that she would have communicated that information to anyone who asked. (SR II 64-84.) All Apex needed to do was to contact Ms. Hightower. If Apex was aware of Ms. Hightower's notations, and the trial court concluded it was (Pet. App. 114a-15a), it had a constitutional obligation to follow up on them.

Apex's "reasonable steps" were all undertaken in 1995 *before* the letters with the notations were returned. As Justice Kilbride noted in dissent, once the letters were returned with the "person is hospitalized" notation, along with Ms. Hightower's route number and initials, Apex "'did – nothing'." (Pet. App. at 26a. (quoting *Jones*, 547 U.S. at 234).) When the letters were returned, Apex already knew that Ms. Lowe was not living at that address, and that its previous efforts to locate her had been unsuccessful. Yet it did nothing with this new information. Clearly, it would have done *something* if it truly desired to find Ms. Lowe, and was not simply desirous of making a record to justify obtaining a deed to her property for a bargain basement price at a perfunctory, *ex parte* proceeding.

Finally, the Illinois court's application of *Jones* cannot be reconciled with that of other courts. For example, the First Circuit, concluding that *Jones* "held that the government was required to take some reasonable follow-up measures . . . when it learned its initial attempt had failed," held that if "the government has easy access to a lead that it knows (or reasonably should know) is potentially fruitful, it has some duty to elicit the available information and take reasonable action in response to it." *United States v. One Star Class*

Sloop, 458 F.3d 16, 23 n.7, 24 (1st Cir. 2006). Similarly, the Missouri Supreme Court observed that "*Jones* concluded that the government's knowledge that notice was ineffective triggered an obligation to take additional steps, if practicable, to effect notice." *Conseco Fin. Servicing Corp. v. Mo. Dept. of Rev.*, 195 S.W.3d 410, 417 (Mo. banc 2006). *See also Luessenhop v. Clinton County, New York*, 466 F.3d 259, 270 (2d Cir. 2006) (*Jones* requires additional reasonable steps based on new information garnered from the returned notices); *Vosilla*, 944 So. 2d at 300 (*Jones* requires consideration of "unique information about an intended recipient that might require the taxing authority to make efforts beyond those required by the statutory scheme under ordinary circumstances").

In sum, the Illinois court interpreted and applied *Jones* in a manner inconsistent with both the central holding of *Jones*. The petition should be granted and the judgment below reversed.

III. THE QUESTION WHETHER A STATE STATUTE MAY PRECLUDE A HOMEOWNER WHO DID NOT RECEIVE ACTUAL NOTICE OF THE TAX DEED PROCEEDING, AT WHICH HER PROPERTY RIGHTS WERE EXTINGUISHED, FROM CHALLENGING THE SUFFICIENCY OF THE NOTICE OF THAT PROCEEDING ON FEDERAL CONSTITUTIONAL GROUNDS, IS AN ADDITIONAL QUESTION WARRANTING REVIEW.

On remand, the Illinois court adhered to its prior holding that the trial court's *ex parte* state law finding of "due diligence" could not be challenged in this proceeding because Ms. Lowe was precluded as a matter of state statute from challenging the federal constitutional sufficiency of Apex's

efforts to give her notice. (Pet. App. 23a) The Illinois court ostensibly declined to revisit its previous *sua sponte* holding on the ground that its "reconsideration of Apex's diligent inquiry . . . is limited to whether Apex's notice to Lowe satisfied due process under *Jones*." (*Id.*) But the question whether the Illinois statute precludes due process claims like Ms. Lowe's is necessarily encompassed within that broader question, and is therefore within the scope of the remand.[7]

At all events, Ms. Lowe could not object to lack of notice at the time of the trial court's *ex parte* hearing for the simple reason that she was not there – a result of Apex's failure to take adequate steps to ensure that she received notice of the proceeding. To hold that she is barred by her failure to object in such circumstances is both nonsensical and contrary to prior decisions of this Court, which establish that a party may not constitutionally be deprived of the opportunity to contest the sufficiency of notice by virtue of not having received notice in the first instance. *Logan*, 455 U.S. at 429-30 (stating that the Due Process Clause prohibits the States from denying a litigant access to "adjudicatory procedures when such action would be the equivalent of denying them an opportunity to be heard upon their rights"); *see also Peralta v. Heights Medical Center*, 485 U.S. 80, 86-87 (1988); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

Other state courts that have addressed the precise question presented here have held that "allowing for the deprivation of property without any redress would be

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[7] The Illinois court's refusal to acknowledge that point simply underscores the extent of its unwillingness to give effect to a decision of this Court with which it appears to disagree. If Ms. Lowe's federal constitutional claim were (or could be) barred by a state statute, the Illinois Supreme Court would have dismissed the case on that ground. Of course, it did not do so.

patently unconstitutional." *In re Petition by Treasurer of Wayne County*, 732 N.W.2d 458, 462-63 (Mich. 2007); *accord In re Foreclosure of Liens for Delinquent Taxes*, No. 2002-CA-99, 2003 WL 1795569 *3 (Ohio Ct. App. April 4, 2003); *Beneficial Ohio, Inc. v. Primero*, L.L.C., 851 N.E.2d 510, 512 (Ohio Ct. App. 2006). *See also Yi Tu v. Nat'l Transp. Safety Bd.*, 470 F.3d 941, 945 (9th Cir. 2006) (holding post-*Jones* that the denial of due process in failing to provide notice also denies due process because it denies the opportunity to appeal).

In sum, the petition should be granted and the judgment below reversed.

CONCLUSION

Petitioner respectfully suggests that the Court grant the petition and summarily reverse the judgment of the Supreme Court of Illinois as to all three questions presented. Alternatively, petitioner requests that the petition be granted and the case set down for plenary consideration.

Respectfully submitted,

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